



June 19, 2019

**VIA ECFS**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554

**Re:    *Connect America Fund, WC Docket No. 10-90; Connect America Fund Phase II Auction, AU Docket No. 17-182; ETC Annual Report and Certifications, WC Docket No. 14-58***

Dear Ms. Dortch:

NTCA—The Rural Broadband Association (“NTCA”) hereby files this letter in response to a Petition for Waiver (“Wisper Petition”) reportedly submitted to the Federal Communications Commission (the “Commission”) by Wisper ISP, Inc.

As an initial matter, NTCA uses the term “reportedly” in describing the Wisper Petition because NTCA can find no record in the Electronic Comment Filing System (“ECFS”) of any such petition having been filed with the Commission. Rather, NTCA only became aware of the existence of the Wisper Petition by reference to it in a recent public filing by Conexon, LLC in the above-referenced dockets.<sup>1</sup> The fact that the Wisper Petition is, at least as of yet, unavailable for public review and comment is concerning, as the rules governing waivers indicate that consideration and action with respect to any such requests must be conducted in accordance with the Administrative Procedure Act.<sup>2</sup>

Nonetheless, in addition to and despite the procedural disadvantage of lacking access to a copy of the underlying Wisper Petition, NTCA believes the Conexon Opposition raises significant questions in at least two respects.

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<sup>1</sup> Conexon reports having learned of the Petition only via the conduct of discovery in connection with Wisper’s efforts to obtain eligible telecommunications carrier (“ETC”) designation from the Oklahoma Corporation Commission (“OCC”). Opposition of Conexon, LLC to Wisper ISP, Inc. Petition for Waiver of Deadline for ETC Designation, WC Dockets No. 10-90 and 14-58, AU Docket No. 17-182 (filed June 12, 2019) (“Conexon Opposition”), at n. 1 (indicating Conexon received a copy of the Wisper Petition on May 24, 2019, through a responsive discovery request in the Oklahoma proceeding).

<sup>2</sup> 47 C.F.R. § 1.3.

First, as the Commission’s rules indicate, “good cause” is required for grant of any waiver.<sup>3</sup> Wisper has apparently contended in its petition that it is entitled to a waiver from the obligation to obtain ETC designation within the timeframes contemplated by this Commission because it has not yet received such designation from the OCC. Yet, this Commission expressly contemplated that a would-be ETC must pursue designation diligently and exercise “good faith efforts” in doing so. The example provided by the Commission to demonstrate when a waiver would be justified involved a purely procedural complication of a state commission open meeting scheduled to occur after the 180-day window targeted by the Commission for submission of proof of ETC designation. Although it is true that the Commission declined to adopt “a hard rule” requiring submission of an ETC designation application within a specified period of time, the Commission expected “winning bidders will have an incentive to file their ETC applications expeditiously” – and the Commission further presumed “that an entity will have acted in good faith if the entity files its ETC application within 30 days” of being identified as an provisional winner of auction-based universal service support.<sup>4</sup>

Despite the Commission’s predictions as to the incentives for would-be ETCs to seek designation promptly, the Conexon Opposition indicates that Wisper did not even begin to pursue designation in Oklahoma until nearly four months after being announced as a winner in the Connect America Fund (“CAF”) Phase II auction. Even more surprisingly, the Conexon Opposition reports that, when asked why it delayed seeking ETC designation on a more timely basis, Wisper responded in discovery that it “*made the strategic determination to wait*” an additional four months before submitting any application for Oklahoma.<sup>5</sup> If these basic facts are accurate as asserted – and Conexon reports that Wisper has refused to explain them further, citing attorney-client privilege – they would seem contrary to the Commission’s expressed expectations with respect to the timeliness for auction winners to seek ETC designation in the applicable states. Put another way, unless mitigating facts exist that cannot be discerned and are not evident on the public record related to the waiver request (because no such public record exists), it is hard to see how “good cause” could exist for the grant of a waiver where there is an apparent lack of “good faith” in seeking ETC designation in the first instance.

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<sup>3</sup> *Id.*

<sup>4</sup> *Connect America Fund, et al.*, WC Docket No. 10-90, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 5949, 6002-03 (2016), at ¶¶ 152-153.

<sup>5</sup> Conexon Opposition at 5 and Attachment B (Cause No. PUD 20180154, Responses and Objections of Wisper ISP, Inc. to Conexon, LLC’s Data Request No. 2, Wisper Responses to No. 2-10)) (emphasis added).

Second, a significant source of concern, confusion, and delay in some of the underlying state commission proceedings appears to arise out of the fact that Wisper may have incorrectly identified what it was obligated to deliver in terms of broadband service levels as a winning bidder in the CAF Phase II auction. Specifically, despite having claimed to be capable of delivering 100/20 Mbps broadband across wide swaths of rural America in the auction, the Conexon Opposition indicates that Wisper asserted in at least some of its state ETC designation applications that it was only obligated to deliver 25/3 Mbps broadband.<sup>6</sup> While this was seemingly corrected later in several of the state application proceedings, the Conexon Opposition also indicates some lingering confusion exists on the record in several other states.<sup>7</sup> To the extent that the Conexon Opposition captures accurately the course of events in the state proceedings, and if ETC designations were obtained from a state commission without accurate understanding of federal obligations and what consumers in those states could expect from the would-be ETC, this is worthy of further review as well by this Commission. In the end, the ETC designation process and related reviews are critical for this Commission and state commissions representing interested consumers to ensure upfront accountability and to promote integrity in distributions of support.

Thank you for your attention to this correspondence. Pursuant to Section 1.1206 of the Commission's rules, a copy of this letter is being filed via ECFS.

Respectfully submitted,

/s/ Michael R. Romano

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<sup>6</sup> Conexon Opposition at 6 and 17-19 (citations omitted). NTCA has previously filed with the Commission regarding the importance of employing a more robust and thorough technical review, including review by third-party stakeholders subject to protective order, to ensure that would-be applicants are capable of – and in fact have plans in place to deliver – the service levels at which they bid in the auction. *See, e.g., Ex Parte* Letter from Michael R. Romano, Sr. Vice President, NTCA, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90 (filed Dec. 17, 2018), at 3.

<sup>7</sup> Conexon Opposition at 17-19.